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No. 06-157

In the Supreme Court of the United States

JAY F. HEIN, ET AL.,

Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE CHRISTIAN LEGAL SOCIETY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE**

The Christian Legal Society (the Society) is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and members at over 140 accredited law schools. The Society's legal advocacy and information division, the Center for Law & Religious Freedom (the Center), works for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in state and federal courts throughout this nation. The Center strives to preserve religious freedom in order that men and women might be free to do God's will, and because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Among such inalienable rights is the right of religious liberty.

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* The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

ARGUMENT

Amicus joins Petitioners in urging this Court to reverse the judgment of the United States Court of Appeals for the Seventh Circuit.

Understanding *Flast v. Cohen*, 392 U.S. 83 (1968), and its holding with respect to taxpayer standing first requires understanding the nature of the Establishment Clause. *Flast*'s double-nexus test[1] has never been satisfied outside the Establishment Clause context.[2] There is a good reason for that development, one with which *Amicus* agrees.

I. The Nature of the Establishment Clause.

The Establishment Clause is structural in character. Or, more precisely, since the mid-20th Century it has come to be regarded as such by this Court. *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998). As such, the no-establishment principle is about the separation of church and state or, more specifically, the clause is about properly ordering relations between church and state.

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[1] 392 U.S. at 102.

[2] For example, this Court has twice rejected taxpayer claims brought under the Free Exercise Clause. *See Tilton v. Richardson*, 403 U.S. 672, 689 (1971) (taxpayers lacked the requisite burden on religion); *Board of Education v. Allen*, 392 U.S. 236, 248-49 (1968) (same). The determinations in *Tilton* and *Allen* were sound.

The work of the modern Establishment Clause is thus to keep in proper relationship two centers of authority, government and organized religion. That development ought to come as little surprise because the dual-authority pattern of state and church[3] has been part of the Western legal tradition since the Fourth Century.[4] American jurisprudence, standing as it does in the stream of Western civilization, could not help but have as a presupposition of its fundamental laws an ordering of relations between church and state.[5]

To be sure, the precise location of the line between church and state in Western history has

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[3] JOHN F. WILSON & DONALD L. DRAKEMAN, CHURCH AND STATE IN AMERICAN HISTORY 1-10 (3d ed. 2003). "So there were two, Priest and prince, or church and state, each needed the other, but both were separate aspects of one society. This separated double authority structure is what marked off Western Christendom from Eastern Christianity, and it properly locates the significance of 'church and state.'" *Id.* at 3-4.

[4] *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J.L. & POL. 445, 445-53 (2002); Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1391-94, 1576-92 (2004).

[5] Lecturing on comparative law, Roscoe Pound, then Dean at Harvard Law School, was identifying those received precepts, those assumed starting points, those presuppositions from which Western law unconsciously draws. One such fundamental principle in the West is that church and state have long been regarded as distinct centers of authority: "In the politics and law of the Middle Ages the distinction between the spiritual and the temporal, between the jurisdiction of religiously organized Christendom and the jurisdiction of temporal sovereign, that is, of a politically organized society, was fundamental." Roscoe Pound, *A Comparison of Ideals of Law*, 47 HARV. L. REV. 1, 6 (1933).

always been disputed, with the government sometimes dominating the church and the church sometimes dominating the government. But what is not contested in the Western legal tradition is that — wherever one draws that line — there are two centers of authority, each with its own purview. In the United States, unlike with the various European models, the additional step of disestablishment was taken, essentially a deregulation of the specifically religious sphere.[6]

By observing that the Establishment Clause is "structural," *Amicus* means that the task of the Establishment Clause is to police the boundary between government and organized religion. This proper ordering of church-state relations is to the mutual benefit of both the body politic and organized religion.[7]

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[6] Historian Jack Rakove writes:

> [James] Madison and [Thomas] Jefferson were not mere tolerationists; they countenanced a constitutional solution to the religion question, renouncing the authority of the state to regulate the one aspect of behavior that had most disrupted the peace of society since the Reformation. For at the heart of their support for disestablishment and free exercise lay the radical conviction that nearly the entire sphere of religious practice could be safely deregulated, placed beyond the cognizance of the state, and thus defused as both a source of political strife and a danger to individual rights.

JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 311-12 (1997).

[7] Statements observing such reciprocity are common in this Court's cases. *See, e.g.*, *McCollum v. Board of Education*, 333

That the Supreme Court has regarded the Establishment Clause as ordering relations between church and state is manifest in this Court's case law in six or seven different ways. *See* Esbeck, *supra* note 4, 18 J.L. & POL. at 456-71 (relaxed standing rules; awarding of remedies for harms other than religious harm; awarding class-wide remedies, not just relief for the claimants before the court; dismissals of claims for lack of subject matter jurisdiction; two definitions of religion, one for the Free Exercise Clause and one for the Establishment Clause, reflecting the different purposes of each clause; the awarding of remedies that protect organized religion from its own harmful choices).

One of the most telling validations of the structural character of the Establishment Clause is the special standing rule in *Flast v. Cohen*. *See* Esbeck, 84 IOWA L. REV. at 33-40.

Broadly speaking, the Establishment Clause is about preventing two types of harms: (a) prohibiting the government from embracing a specifically religious doctrine or observance that then causes division within the body politic along religious lines (often dubbed "political divisiveness along religious

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U.S. 203, 212 (1948) ("For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 730 (1871) ("The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority.").

lines")[8]; and (b) prohibiting entanglement by the government and other intrusions into religion that cause harm to the internal freedom of religious organizations (often dubbed "church autonomy"). *See* Esbeck, 84 IOWA L. REV. at 60-63. That church-state separation is a "two-way street," that is, it is to operate to the mutual benefit of both, is seen in the *Lemon* test ("primary effect that neither advances nor inhibits religion" and "no excessive entanglement")[9] and the endorsement test (government is restrained from "communicating a

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[8] Care must be exercised so that "divisiveness avoidance" does not slop over and violate the Free Speech Clause or the right of Expressive Association. *See McDaniel v. Paty*, 435 U.S. 618, 640-42 (1978) (Brennan, J., concurring in the judgment). Public disputes over the application of religious beliefs to political issues are common in a democracy. At the time of the American founding, republics were still experimental and thought unstable. The founders knew, for example, how sectarian division caused the English Commonwealth (1649-58) to fail. They believed that for a nation-state to take sides in disputes over creeds and other specific forms of religious observance was to dangerously risk dividing the body politic. Hence, for example, religious tests for public office were bad for republics. *See* U.S. CONST. art. VI, § 3 (". . . no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."). The founders believed that specifically religious questions were never properly within the government's temporal authority. *See Watson*, 80 U.S. (13 Wall.) 679 (no civil court jurisdiction with respect to disputes over doctrine, polity, or discipline). But the focus of "divisiveness analysis" must be on the government alone and its specifically religious behavior, not on the expression of private speakers. The latter is fully protected by the Free Speech Clause.

[9] *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

message of government endorsement or disapproval of religion").[10]

Whether an Establishment Clause plaintiff suffers religious harm is not a necessary element of an Establishment Clause claim. *Flast* taxpayer standing does not require a showing of such harm.[11] On numerous occasions, the Establishment Clause has provided redress for individual injuries other than religious harms. *See* Carl H. Esbeck, *Differentiating the Free Exercise and Establishment Clauses*, 42 J. CHURCH & ST. 311, 317-18 (2000) (economic harm or loss of property;[12] constraints on academic freedom and inquiry by teachers and

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[10] *See Lynch v. Donnelly*, 465 U.S. 608, 690 (1984) (O'Connor, J., concurring). The endorsement test is attributed to Justice O'Connor.

[11] This Court has long noted that religious coercion or individual harm does not always (and need not) attend a violation of the Establishment Clause. *See Abington School District v. Schempp*, 374 U.S. 203, 221 (1963) ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not."); *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (same). This further validates that the nature of the no-establishment restraint is structural rather than being rights-based.

[12] *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (economic harm to department store); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (economic harm to a tavern).

students;[13] and restraints on free-thinking atheists[14]).

When a structural provision in the Constitution is transgressed it is not uncommon for there to be no particularized "injury in fact."[15] Rather, the injury is a generalized grievance falling on a large part or all of the body politic. That the harm to a group of taxpayer-plaintiffs is generalized is unsurprising, for the Establishment Clause is structural, ordering and policing relations between the entities of government and organized religion. Hence, there will be occasions (not too uncommon) when the Establishment Clause is violated and no one suffers "injury in fact." This Court responded by adopting the double-nexus test of *Flast v. Cohen*. Had the Court not done so, the judiciary would be unable to address many Establishment Clause violations.

The structural character of the Establishment Clause is relevant to the question whether violations

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[13] *Edwards v. Aguillard*, 482 U.S. 578 (1987) (public school teacher and students desirous of an expanded science curriculum); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (same).

[14] *Torcaso v. Watkins*, 367 U.S. 488 (1961) (ruling in favor of atheist, who by self-profession had no religion and thus no harm to his religion, but who was desirous of holding public office without taking theistic oath).

[15] This happened in both *United States v. Richardson*, 418 U.S. 166 (1974), and *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974). A rights violation is likely to produce a victim and lead to a particularized "injury in fact." When the government transgresses a structural boundary, a generalized grievance often occurs. That said, a structural violation can sometimes lead to a particularized injury. See *supra* nn. 12-14 for examples where a violation of the Establishment Clause did cause individual harm.

thereof can be waived. Although constitutional rights can be waived, violations of constitutional structure cannot be waived. This is because the Constitution's structure (better termed the "frame of government") is there to define and preserve the republic and thereby preserve the liberties of the entire body politic.[16] Because the constitutional frame of limited and divided government, with its checks and balances, is there to safeguard the liberties of all of us, no one litigant (especially the government) could waive it for all others comprising the body politic. This is illustrated by the line-item veto case, *Clinton v. City of New York*, 524 U.S. 417 (1998). One of the arguments by the government for the line-item veto legislation being constitutional was that Congress had enacted the statute and thus had waived its ability to later complain that the legislation wrongly shifted power to the Executive Branch. Justice Kennedy rejected the argument. He noted that there could be no waiver by Congress of the Constitution's separation of powers. That structure (or framework) is there to limit and check government, with the consequential effect of protecting the liberty of us all. *Id.* at 449-51 (Kennedy, J., concurring). In the same manner, a federal court's lack of subject matter jurisdiction is a restraint on the Judicial Branch's Article III authority that can never be waived by a party litigant. *See* Fed. R. Civ. P. 12(h)(3); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 & n.10 (1982) (contrasting the rights-based limit on personal

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[16] The Constitution's framework is not only for the protection of citizens. It protects everyone, alien or citizen, who comes within the jurisdiction of the United States of America.

jurisdiction as an "individual liberty" that can be waived with a structural restraint such as the limit on subject matter jurisdiction that is a "restriction on judicial power" and thus cannot be waived).

II. *Flast* Taxpayer Standing.

Flast taxpayer standing is a legal fiction. *See* Esbeck, 84 IOWA L. REV. at 35-36; Louis Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 74 (1968) ("And it is a fiction that a taxpayer like Flast is asserting a personal stake or interest based on his reluctance to have his tax money expended for the purpose to which he objects."). A federal taxpayer does not have actual "injury in fact" when funds are appropriated from the U.S. Treasury in a manner that violates the Establishment Clause. Moreover, and relatedly, should the taxpayer prevail on the merits, the remedy is not a refund of a tiny part of his or her federal tax dollars.

Amicus does not characterize *Flast* taxpayer standing as a legal fiction to disparage the case. Rather, *Amicus* calls it a fiction merely as an apt description. Like all legal fictions, the fiction in *Flast* is instrumental. It is a legal fiction that a taxpayer-plaintiff has suffered an individual "harm" so as to permit adjudication of a putative transgression of the church-state boundary by the Legislative Branch that would otherwise go without review by the Judicial Branch. It is true, of course, that Congress could have second thoughts and go back and repeal the legislation claimed to improperly involve the government with organized religion. But that is unlikely.

Flast taxpayer standing can be justified because the structural restraint in the no-establishment principle is *sui generis*, that is, it is unlike other constitutional structure which either runs horizontal as between the three federal branches (*i.e.*, "separation of powers") or runs vertical as between the federal government and the governments of the several states (*i.e.*, "federalism").[17] When either separation of powers or federalism is transgressed, or arguably so, there will usually be some other governmental branch eager to defend against encroachment on its turf. Not so with many violations of the proper church-state boundary. For example, a religious organization receiving a grant out of general tax revenues (and the potentially entangling regulations that go along with the funding and that may compromise the faith) is not going to complain about the funding or the accompanying regulations, for the receipt of the funds was voluntary with the religious organization. Such behavior is normal and to be expected. *See* Esbeck, 84 IOWA L. REV. at 39-40, 62-63. Hence, the legal fiction has its utility.

Flast taxpayer standing requires more than a showing that the plaintiff is a federal taxpayer. *Flast* requires spending by Congress under its Article I, Section 8, Clause 1, Taxing and Spending

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[17] Some argue that the Second Amendment is a structural reservation of power to the States concerning Militia, hence not an individual right concerning firearms. If so, it is a structural clause of the federalism sort. Thus perhaps the Establishment Clause is not viewed as the only structural provision in the Bill of Rights.

Power. There have been those who have argued for adopting a far broader legal fiction, namely citizen standing, so long as the underlying claim involves the Establishment Clause.[18]

While *Amicus* urges that *Flast v. Cohen* be reaffirmed, it does not urge that the scope of *Flast* be expanded. *Flast* has shown itself to be workable. It has not led to a vexatious number of lawsuits. It has not led to the Judicial Branch trenching into the authority reserved to the Legislative Branch.

Amicus agrees with the dissent by Judge Ripple in the case below, *Freedom From Religion Foundation v. Chao*, 433 F.3d 989, 997 (7th Cir. 2006) (Ripple, J., dissenting), where he states that *Flast* by its terms is limited to instances where congressional appropriations are made (or grants are awarded) to private-sector parties.[19] *Flast* taxpayer standing should not be extended to situations where congressionally authorized discretionary spending is performed by agencies or officers of the Executive Branch—said to be done in a manner that violates the Establishment Clause. It can be plausibly argued that everything said or done by an officer or agency of the Executive Branch is made possible only by the expenditure of taxpayer monies. If all such Executive Branch actions were reviewable by the Judicial Branch with an eye to church-state

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[18] *See, e.g., Flast*, 392 U.S. at 115-16 (Fortas, J., concurring) (stating that citizen standing would do).

[19] *Flast* was applied in *Americans United for Separation of Church and State v. Valley Forge Christian College*, 454 U.S. 464 (1982), and *Bowen v. Kendrick*, 487 U.S. 589 (1988), but not expanded.

transgressions, that would hazard the Article III Branch superintending the day-to-day work of the Article II Branch. As stated above, *Flast* taxpayer standing is instrumental. *Flast* sought to do more good than harm. But if all Executive Branch utterances and actions are reviewable in a search for church-state boundary violations—and that at the behest of a private-sector taxpayer—then one would have a clear case of doing more harm than good.

There will be those who argue that any alleged structural violation of the no-establishment restraint should be justiciable in an Article III court. If *Flast* had gone that far, then anyone and everyone, citizen or resident alien, would have standing to bring an Establishment Clause claim of any character. The Court in *Flast* did not go that far; nor should it. The double-nexus test of *Flast* was designed to set limits on taxpayer standing that ensure the requisite clash of interests that makes the adversarial process work. The double-nexus test was the prudential stopping point to taxpayer standing. To expand the scope of taxpayer standing beyond *Flast* is to risk violating separation of powers with the Judicial Branch transgressing on the prerogatives reserved to the Executive Branch. That would be a little like destroying the village in order to save it.

CONCLUSION

Amicus requests that this Court reverse the United States Court of Appeals for the Seventh Circuit and order dismissal on the ground that the plaintiffs lack standing.

Respectfully submitted,

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